No. 3803

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief of Plaintiff in Error

M. B. MOORE
Attorney for Plaintiff in Error.

Filed this.....day of....., 1922.

FRANK D. MONCKTON, Clerk.

By.....
Deputy Clerk.

No. 3803

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief of Plaintiff in Error

Under the caption "Government's Contention" in the first paragraph thereof, it is stated that a reading of the testimony in the case establishes beyond cavil that the officers making the seizure

in the automobile had sufficient information to establish probable cause for the affidavit for the issuance of the search-warrant. No citation of authority is given for this assertion, and in truth, none can be found.

The witness, Edison, did not have sufficient information or knowledge in his possession to warrant the issuance of the search-warrant, had he made an affidavit therefor. His testimony amounted to nothing more, and his knowledge amounted to nothing more than an assertion that he saw a quart bottle containing a reddish liquid in the possession of the plaintiff in error. This amounts to nothing more than a suspicion in the mind of Edison that the plaintiff in error was in possession of liquor. Before he could make a sufficient affidavit it would be necessary for him to know the fact. He testified at the trial that he overheard Ed. Regan, in Reno, say to the defendant that he could not handle that kind of stuff. What does that import? It may create a suspicion in his mind, but it doesn't prove a fact.

It is admitted in the brief that one's person, home or effects cannot be searched without a valid search-warrant, and that evidence obtained under an invalid search-warrant cannot be used in a criminal charge growing out of the arrest. It will no doubt also be admitted that a person's belongings and the effects in his possession, and his person, cannot be arrested or seized without a valid search-warrant, unless

under the conditions enumerated in our opening brief.

It is also stated in the answering brief that counsel does not contend that acts of officers in seizing the liquor and arresting the defendant were not authorized under Sec. 26, Title II of the National Prohibition Act. If, after reading the opening brief, such an opinion as this is justified, then our labor has been in vain. We endeavored to make it plain, and think we have, that the officers in making the arrest, and in all their proceedings, were absolutely without authority, and that before an arrest could have been made, or an arrest of any person driving a vehicle, automobile or other conveyance, can legally be made, the officers must proceed, notwithstanding the Section referred to, in accordance with the statutory law providing for the issuance of search-warrants and arrests; and we most emphatically assert that the officers under such circumstances cannot proceed under Sec. 26 of Title II of the Prohibition Act, except under the authority of a valid search-warrant, or when, and after they have discovered that intoxicating liquor is being unlawfully transported; and can it be claimed that at the time the officers arrested the defendant, which was when they jumped upon the running board of his car and directed him to drive to the City Jail, that they had discovered intoxicating liquor in his automobile? What had they discovered? A bottle containing a reddish liquid, and a box, the contents

of which were unknown. They entertained a suspicion at that time that the contents of the bottle were intoxicating liquor, and after their seizure of the same, and the analysis thereof, they then discovered the fact to be that it was intoxicating liquor. Now they seek to justify their act by having their discovery made at a later time relate back to their initial act and legalize the initial act, which is the reverse procedure to that contemplated by the law.

Another exemplification of the rule of action by which a great many officers are guided; that is, "That the ends justify the means". Where the great constitutional right of the people is involved, the courts will not permit that right to be swept away and destroyed for the convenience of the officers, nor for the reason that in sustaining the constitutional right of the people that some individual, manifestly guilty, might escape. The authorities cited in our brief are uniform upon these propositions.

On page 4, under the title "The Law" in the answering brief, counsel says, "The lawfulness of the seizure in this case is not to be determined by the same rule of law which authorizes the issuance of a search warrant. Such a phase would absolutely nullify the provisions of Section 26, Title II of the National Prohibition Act."

By what process of reason counsel arrives at this conclusion, we are unable to determine, and such a conclusion can only be reached by destroying and

nullifying the provisions of the Fourth Amendment to the Constitution, which are general in terms and not special.

Counsel refers to a case cited in our opening brief, Ex Parte Rhodes, 1st A. L. R. 568, and then cites as holding to the contrary, case of Maples vs. the State, 82d Southern, page 183, in which case the Supreme Court of Alabama held "That an act authorizing any Sheriff or arresting officer who becomes cognizant of the facts or who finds liquor in such conveyance or vehicle being illegally transported shall seize the same", was not unconstitutional; and all the court says in that case is that the act is not unconstitutional, and does not conflict with Ex Parte Rhodes supra. A reading of the case of Ex Parte Rhodes and the numerous cases therein cited will convince the court that the question in the case of Ex Parte Rhodes was the same as the question to be settled in the instant case, and was an entirely different question from the one in the case of Maples v. the State, 82d Southern, page 183; and if the court was now asked to determine the sole question as to whether or not Sec. 26 of Title II, was constitutional or unconstitutional on the face thereof, it would unquestionably say that the Section is constitutional, if it be construed in accordance with the provisions of the Fourth Amendment; but that if it is to be construed as being superior to the Fourth Amendment and that it is to be construed as giving the right to an

officer without actual knowledge of the facts to make an arrest and to seize a conveyance or vehicle, when and where he will, then it is unconstitutional.

In the case of Ex Parte Rhodes supra, a citizen of Birmingham informed an officer of the City of Birmingham, that Rhodes had violated one of the city ordinances, and under the ordinance of the City of Birmingham, it was provided that upon the verbal request of any citizen who informed the officer that some person had violated a city ordinance or a state law, that the officer was authorized to make the arrest. There is no difference in principle in the provisions of this ordinance and in the provisions of Sec. 26 Title II of the Prohibition Act. If the construction sought by the Government is placed upon Sec. 26, Title II, the provision of the Constitution of the State of Alabama, relative to search and seizure, is similar, if not identical, to the Fourth Amendment to the Constitution of the United States; and the Court, in commenting upon the legality of the arrest in question, says: page 571 of 1st A.L.R.

> "If the arrest under consideration was lawful, or can be made so without amending the Constitution, then this guaranty of the Bill of Rights has failed of its purpose, to secure the people from unreasonable arrests. Surely the phrase "unreasonable seizure" included an arrest like the one now under consideration. If not, it would be difficult to suppose a seizure or arrest of the person that would be unreasonable. The same is

true as to the phrase "due process of law". Surely, any seizure or arrest of a citizen is not reasonable, or any process is not "due process", merely because a legislature or a municipality has attempted to authorize it. These phrases are limitations upon the power of the legislature, as well as upon that of the other departments of government, or of their officers."

In the same opinion the learned jurist quotes from the case of Re Dorsey, 7th Port. (Ala.) 283, as follows:

"In that case, after quoting the above Section of our Bill of Rights, Justice Ormond said:

" 'By this it appears, not only that the rights asserted in this instrument are reserved out of the general powers of government, but also that this enumeration shall not disparage others not enumerated; and that any act of the legislature which violates any of these asserted rights, or which trenches on any of these great principles of civil liberty, or inherent rights of man, though not enumerated, shall be void.

" 'It cannot, I think, be successfully maintained that this last and not least important clause of the Bill of Rights is void of meaning. Is it unreasonable to suppose that the framers of this declaration knew that the principles maintained by the immortal British judges, cited in this opinion, as well as by the jurists of our own country, had been frequently called in question; and that they intended to provide against every possible infraction of our free institutions?

" 'In ascertaining the intention of the people, in the reservation of certain great rights and privileges, we should give them a broad and liberal construction, so as to effect the manifest intention of its framers. In this there is no danger. They

have asserted that they have not delegated the power to invade either of the great natural rights just cited. Does it become this court or the legislature to quibble on its terms?' "

In the same case the learned jurist quotes from the case of Sadler v. Langham, 34th Ala. 311:

"Constitutional provisions are intended as a protection to life, liberty, and property, against encroachment, intentional or otherwise, at the hands of the government. Had not the framers of our system of government supposed it possible that legislative bodies might fall into error, they would not, in their sovereign capacity, have adopted a written Constitution, superior alike over themselves and the legislature. We cannot believe that construction a sound one which indulges every reasonable presumption against the citizen, when the legislature deals with his rights, and gives him the benefit of every reasonable doubt, when his life and liberty are in jeopardy before the courts of the country."

Again in the same opinion, quoting from the case of Boyd v. U. S., 116th U. S. 616, 29th L. ed. 846:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and propetry should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of course to be watchful for the constitutional rights of the citizen and

against any stealthy encroachments thereon. Their motto should be, Obsta principiis. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presenation, from noticing objections which become developed by time and the practical application of the objectionable law."

Quoting again from the same opinion in the case of Pinkerton v. Verberg, 7th L.R.A. 507, a case in which a woman was arrested by a policeman under the charge that she was a prostitute or street-walker, the court says:

"The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. Whatever the charter and ordinances of the city of Kalamazoo may provide, no police officer or other conservator of the peace can constitutionally be clothed with such power as was attempted to be exercised here. No disorderly conduct; no breach of the peace, committed in the presence of the officer; no suspicion of felony."

Counsel cites in support of his position that this was a legal seizure, the case of State v. Crossen, 264th Fed. 459; and this is but a mere dictum of the Court and cannot be relied upon as an authority.

Counsel also cites as in support of his position the case of United States v. Fenton, 268th Fed. 221. From a reading of this case and the authorities cited in support of the opinion, it will become self-evident to this Court that the learned Judge writing the opinion did not give the question very mature consideration. The Court simply says that they were taken in a commission of a misdemeanor, if not of a felony; and arrives at his conclusion from the decisions cited in the case. These decisions were all based upon proceedings for the condemnation of stills and property growing out of statutes providing for the collection of revenue and taxes, in which no conviction was necessary before the articles might be condemned. The National Prohibition Act in terms repeals all acts in conflict with its provisions. Section 26, Title II of the Prohibition Act provides the only means whereby an automobile may be condemned and confiscated. It is not forfeited to the Government, as stated in the opinion, from the mere fact that liquor is being transported therein. This Section provides:

"The Court, upon conviction of the person so arrested, shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the

property seized."

And it is only after a conviction that the liquor can be destroyed or the vehicle seized can be sold.

The case of the Commonwealth v. Marcum, 24th L.R.A. New Series, page 1194, is the only case cited by counsel which is anyways near in point; but when the facts of that case are examined it will present an entirely different state of facts from those in the instant case. In that case an over act was committed, if not in the immediate presence of the officers, yet in immediate presence of numerous other people, which act, if not a felony, bordered upon a felony; and it will appear self-evident to the court that the Supreme Court of Kentucky, while not in terms disaffirming the decision of the case of Commonwealth v. Marcum, has, by all the reasoning advanced, disaffirmed it in the case of Youman v. the Commonwealth, 13th A.L.R. page 1303. In this connection we beg leave to cite the case of State v. Gleason, 4th Pac. Reporter, page 363, in which case the court holds:

"That so long as the provisions of the Constitution of that state remain as they are, that the legislature has no power to pass an act that will infringe thereon, and that the courts must yield implicit obedience thereto."

And in which last mentioned case, the court says: page 366:

"Article 4 of the amendments to the constitution of the United States is almost identical with

said section 15, and Story says that 'this provision seems indispensable to the full enjoyment of the the rights of personal security, personal liberty, and private property, and its introduction into the amendments was, doubtless, occasioned by the strong sensibility excited both in England and in America upon the subject of general warrants, almost upon the eve of the American revolution.'"

The Court further says:

"If a warrant, in the first instance, may issue upon a mere hearsay or belief, then all the guards of the common law and of the bill of rights of our own constitution to protect the liberty and property of the citizen against arbitrary power are swept away. There is no necessity of going so far, and the constitution warrants no such conclusion. The expressions of the bill of rights are very plain and very comprehensive, and cannot be misunderstood. The oath or affirmation of a complaint or information upon which a defendant is arrested in the first instance must set forth that the allegations and facts therein contained are true."

As directly in point upon the question now before the Court we beg leave to cite a case not cited in our Opening Brief, to-wit:

Tillman v. the State, 88th Southern, page 374 decided April 18th, 1921, by the Supreme Court of Florida.

This case was one wherein Tillman was charged with attempted murder growing out of the follow-

ing facts:

A Deputy Sheriff, during the night, passing along the public highway, saw Tillman, a negro, walking on the road with a jug under his arm. He stopped his machine, asked Tillman what he had, to which Tillman made some reply that the officer did not catch. The officer got out of his car and endeavored to take the jug from the possession of Tillman. Tillman drew his gun and it was discharged twice in the scuffle. Tillman broke away, taking the jug with him.

The officer testified he did not know whether it was a jug of molasses or jackass whiskey.

The Court, passing upon the question as to the right of the officer to make an arrest under such circumstances or to search the party or to seize the property, held that such a procedure was unlawful and in direct violation of the constitutional right of the citizen as prescribed under the Constitution of Florida and the Fourth Amendment to the Constitution of the United States.

We earnestly contend that if the legislature is without power to pass an act authorizing an arrest upon a warrant issued by a court of competent jurisdiction upon a complaint which is based upon hearsay, or which does not state facts sufficient to show probable cause, that there is more reason why the legislature, or Congress, is barred from passing a valid act that will authorize officers, who cannot be held responsible in damages, or otherwise, to, at

their pleasure, arrest the citizen and seize their property without warrant of any kind. It is said in the case of U. S. v. Flagg, 233 Fed. 483-84, quoting from the opinion of Judge Bradley:

"It is not the breaking of the doors that constitutes the essence of the offense, but the invasion of the indefeasible right of the personal security of the citizen where that right has not been forfeited by his conviction of some public offense." It is the invasion of this sacred right of the citizen which should be protected, and how, may we inquire, is this sacred and indefeasible right of the citizen to be protected and upheld if the officers are authorized to stop any traveler and search his machine, and then, if after they search, they find contraband liquors, arrest the individual and confiscate his property? Such procedure cannot be justified under the Constitution, and if permitted, absolutely destroys the guarantees of the Constitution, both State and Federal.

Respectfully submitted,

M. B. MOORE,

Attorney for Plaintiff in Error.